

**TESTIMONY**

of the

**NATIONAL GRAIN AND FEED ASSOCIATION**

before the

**SUBCOMMITTEE  
ON  
SURFACE TRANSPORTATION AND MERCHANT  
MARINE**

of the

**COMMITTEE  
ON  
COMMERCE, SCIENCE, AND TRANSPORTATION**

**UNITED STATES SENATE**

**March 2, 1999**

The National Grain and Feed Association (NGFA®) appreciates this opportunity to present its views on reauthorization and funding of the Surface Transportation Board and federal law governing commercial rail transportation.

The NGFA is the U.S.-based nonprofit trade association of about 1,000 grain, feed

and processing firms comprising 5,000 facilities that handle more than two-thirds of all U.S. grains and oilseeds<sup>15188</sup>. Founded in 1896, our membership encompasses all sectors of the industry, including country, terminal and export elevators; feed mills; cash grain and feed merchants; end-users of grain and grain products, including processors, flour millers and livestock and poultry integrators; commodity futures brokers and commission merchants; and allied industries, such as banks, railroads, barge lines and grain exchanges. Additionally, 36 state and regional agribusiness associations are NGFA Affiliated Association members.

## **Agriculture's Unique Challenges in Transportation**

U.S. agriculture shares many transportation challenges with other sectors of the economy, including shippers of industrial, chemicals, plastics, coal and other bulk commodities.

But it is important to stress that in several fundamental respects, U.S. agriculture is unique compared to these other transportation-dependent industries. It is because of this uniqueness that, in some cases, targeted solutions applicable only to the agricultural sector may be necessary.

What makes U.S. agriculture so unique in a transportation sense?

First, shippers tend to be decentralized, a necessity for serving the broad geographic expanse of U.S. agricultural production. Grain elevators (the first buyers and receivers of grain) are not factories. Nor are they portable. They are located where grain is produced, and often have few realistic economic alternatives.

That's an important distinction. While admittedly not an optimal solution, it may

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<sup>15188</sup> These firms are classified as NGFA Active members and comprise the primary NGFA membership class. NGFA Active members are those firms “engaged in the warehousing, processing, manufacturing, merchandising, or distribution of grain or feed, or feed ingredients in the United States.”

be feasible for other industries to relocate when confronting unreliable transportation service in a specific area. Indeed, some industries have located in cities like Houston, Texas, simply because it historically was an important rail terminal with reliable service. If this reliability changes to unpredictability, moving the industrial plant and production can be an option.

Second, agricultural shippers tend to operate facilities that are smaller in size, operation and shipping volumes versus coal, another rail-dependent bulk commodity. Some agribusiness companies have sizable holdings and operations. But generally, the volume of shipments originating from any one location is much lower than the typical large mining facility. Thus, the economic ability of any particular company in our industry – either large or small – to address specific transportation problems for a single location usually is more limited than in many other industries. This characteristic has particular relevance when considering policies that will be most pragmatic and effective in resolving carrier-shipper disputes.

Third, portions of U.S. agriculture have more variable, less predictable transportation needs than other industries. Some industries, driven by ordering systems or industrial plans developed months in advance, can operate a highly scheduled transportation service. While U.S. grain movements to domestic users<sup>0</sup>, such as poultry, livestock and processing operations can operate on a fairly scheduled basis, it is well-known that export grain and oilseed shipments are more sporadic, subject to seasonal fluctuations in global supply availability as well as surges based upon global weather patterns, economics and demand. The United States is diversifying its dependence on raw grain exports by expanding exports of meat and other value-added products. But the export of whole grains and oilseeds still accounts for roughly 25 percent of the demand base for U.S. field crops. U.S. agriculture obviously cannot afford to lose this export

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<sup>0</sup> “January estimates put 1998/99 U.S. grain (excluding rice) and soybean production at 16,120 million bushels. ... Domestic use is projected at an all-time high of 11,627 million bushels, while exports are expected to rise 4 percent from 1997/98 at 3,857 million bushels.” U.S. Dept. of Agriculture, Agricultural Marketing Service, **Grain Transportation Prospects: USDA/STB Grain Logistics Task Force** (Feb. 1999).

demand base. But how do we position ourselves to logistically manage the surges, and thereby deliver the greatest potential value back to the farmer?

How important is predictable, reliable rail service to U.S. agriculture? Roughly 40 percent of all commercial grain movements to markets are carried by rail. In some western growing areas, it is not unusual to have 75 percent or more of shipments moving by rail. Railroads link the major production regions of the Midwest with processing, livestock and poultry operations on both east and west coasts, as well as all the ports. In the long-haul movements required to keep grain flowing reliably from production regions to points of consumption, rail is often the only viable economic alternative. Many grain shippers are located beyond effective trucking distances from markets and far from navigable inland waterway transportation.

### **Private Sector Progress Being Made**

While a great deal of both Congressional and regulatory attention was focused on the rail industry following the 1997-98 delays and performance problems in the Western U.S., the NGFA is pleased to report that both rail service and the relationships between railroads and rail users in the grain, feed and processing industry have improved. That doesn't mean that all problems have been resolved. Indeed, the continuing weak demand for export grain from Pacific Northwest ports means that at least parts of the Western rail system may not have really been "tested" since 1997. Quite frankly, grain exporters and their rail carriers would probably prefer a few more problems if that was the price for reinvigorating the export sector of the business!

- **Historic Agreement on Rail Arbitration and Mediation Reached**

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NGFA and the nation's freight railroads in the past year reached what can only be

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<sup>18418</sup> The agreements were contained in three documents, which are attached to this testimony: 1)

described as historic private sector agreements<sup>18418</sup> for resolving railroad/rail user disputes. Each Class I railroad, along with a number of important shortline and regional railroads, agreed to binding arbitration with NGFA-member rail users as the method of resolving eight categories of disputes. The arbitration agreement is effective until October 1, 2000 and binds signatory railroads and NGFA-member rail users<sup>0</sup> (electing to be covered by the agreement) to arbitrate covered issues of \$200,000 or less per occurrence. Additionally, the railroads agreed to enter into confidential mediation on certain rate issues upon request by any NGFA-member rail user. Moreover, the railroads agreed to use NGFA as the administrator of the arbitration and mediation processes provided for in these agreements.

- The NGFA administers what is believed to be North America's oldest industry-based arbitration system<sup>18465</sup>. The association has actually arbitrated disputes since its founding in 1896 and formal arbitration rules have been in place since 1901. As part of the arbitration agreement reached with the nation's freight railroads, a new NGFA Rail Arbitration Rules Committee was established. This new committee<sup>0</sup>, comprised of representatives of five railroads and five rail users, is charged with monitoring the new rules and proposing amendments to the NGFA Rail Arbitration Rules. Additionally, two railroad representatives<sup>19241</sup> were appointed to the 12-member NGFA Arbitration Appeals Panel.

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While the NGFA Rail Arbitration Rules became effective on October 1, 1998, the new NGFA Rail Arbitration Rules Committee has been hard at work and already has developed a proposal to expand the rules to cover sidetrack-related property damage claims. This amendment is scheduled for a membership vote by both NGFA-member railroads and rail users at the NGFA's annual convention on March 23 and will become effective 30 days thereafter if approved.

- **Arbitration of Service Issues**

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*Agreement on Predispute Consent to NGFA® Arbitration; 2) NGFA Rail Arbitration Rules; and 3) Predispute Agreement to Mediate Certain Rate Issues.*

<sup>0</sup> A complete list of both the railroad and rail user signatories to the agreements is available on the public portion of the NGFA's Internet website at: <http://www.ngfa.org>.

<sup>18465</sup> David C. Barrett, Jr., *Arbitrating Agricultural Disputes: The National Grain and Feed Association's Experience*, 68 North Dakota Law Review 539 (1992).

<sup>0</sup> The ten voting members of the committee are: **Stevan Bobb** (chairman), The Burlington Northern and Santa Fe Railway Co., Fort Worth, Tex.; **George Aspatore, Esq.**, Norfolk Southern Corp., Norfolk, Va.; **Joseph M. Guenley**, Agrex, Inc., Overland Park, Kan.; **Ed Kammerer**, Illinois Central Railroad, Chicago, Ill.; **Diane Knutson**, Union Pacific Railroad, Omaha, Neb.; **Ed Laur**, Attebury Grain, Inc., Amarillo, Tex.; **Steve Milligan**, ConAgra Grain Companies, Minneapolis, Minn.; **Sharon Mock**, Perdue Farms, Inc., Salisbury, Md.; **Tom Owen**, CSX Transportation Co., Jacksonville, Fla.; and **Terry Voss**, Ag Processing, Inc., Omaha, Neb. Serving as ex-officio members of the committee are: NGFA Rail Shipper/Receiver Committee Chairman **John L. Bratten**, Central Soya Company, Inc., Fort Wayne, Ind.; and NGFA Arbitration Appeals Panel Chairman **John L. McClenathan, Jr.**, GROWMARK, Inc., Bloomington, Ill.

<sup>19241</sup> **David C. Bastress**, Kansas City Southern Railway, Kansas City, Mo.; and **Dennis W. McLeod**, Red River Valley & Western Railroad, Wahpeton, N.Dak.

NGFA believes that measures should be implemented to increase “accountability” between railroads and rail users on service-related issues<sup>8</sup>. Building on the successful arbitration agreement already reached with the nation’s railroads, the **NGFA is hopeful that this accountability can be encouraged through the implementation of additional arbitration rules which permit private sector resolution of, among other things, the following:**

- - ◆ the commercial reasonableness of railroad tariffs/rules or contract provisions applicable to rail car placement and service;
  - ◆ actual damages to a rail user when a railroad fails to provide service when promised or fails to pull rail cars after requiring a rail user to load or unload rail cars in a specified period;
  - ◆ issues related to Acts of God or “force majeure” issues, mechanical breakdowns or bunching of cars by a railroad;
  - ◆ issues related to processes for reporting unclean rail cars and car defects (broken hatch covers, gates, etc.) for the mutual efficiency of both railroads and rail users.

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A key NGFA goal is to “enhance the economic efficiency, productivity and competitiveness of all sectors of grain-based agriculture<sup>9</sup>.” This includes supporting rail transportation efficiencies for both railroads and rail users. While railroads often have such efficiencies in mind when developing their rules for transportation, rail users need to have a workable system to challenge the reasonableness of a carrier’s rules. The NGFA believes that arbitration permits a commercially-oriented, case-by-case resolution of such issues and, at the same time, permits rail carriers the freedom to operate without unnecessary regulation.

Importantly, using a system like NGFA arbitration to address such issues permits experienced individuals from both the railroads and the affected industry to resolve the issues in a timely, effective and cost-efficient manner. We remain confident that, to the extent private enterprise can successfully use such private conflict resolution mechanisms, the interests of industry, government and the general public will be better served.

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• **STB Reauthorization and Funding**

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The NGFA supports reauthorization of the Surface Transportation Board for up to two years provided the agency is adequately funded from general appropriations. Funding

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<sup>8</sup> This is different than the catastrophic service failures addressed by the STB in its recently issued final rules in: *Expedited Relief for Service Inadequacies*, STB Ex Parte No. 628 (Dec. 21, 1998) (appeal filed on Feb. 18, 1999 by the Association of American Railroads before the U.S. Court of Appeals for the D.C. Circuit).

<sup>9</sup> **National Grain and Feed Association Long Range Plan** (March 21, 1997).

the agency through user fees, as proposed in the Administration's fiscal year 2000 budget would force the agency to impose user fees at such a high level that the vast majority of rail users would be effectively precluded from pursuing any relief before the agency. This would be especially egregious since the ICC Termination Act of 1995 requires rail users to pursue maximum rate cases and certain other issues before the STB rather than through the federal courts, where the filing fee for a typical civil case is \$120.00.

The NGFA also supports the proposed amendment to the Act contained in S. 98, the *Surface Transportation Board Reauthorization Act of 1999*, which would require that the chairman of the Surface Transportation Board be designated with the "advice and consent of the Senate." We agree that this is appropriate given the importance of rail transportation to both rail users and the overall health of the U.S. economy. The designation of the chairmanship is especially important given that the Board is authorized to be comprised of only three members (versus five members at the former Interstate Commerce Commission).

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## - **Balancing of Rail Transportation Policy**

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The NGFA during 1998 developed proposed changes to the nation's rail transportation policy<sup>0</sup> guiding the STB's oversight of freight railroads. We believe the changes set forth below would strike the proper balance between the needs of railroads and rail users. NGFA believes the changes are both necessary and appropriate given the increased consolidation of the rail industry and the economic power the existing Class I railroads now possess.

NGFA proposes that 49 U.S.C. § 10101 be amended as follows [additions underlined; deletions struck-through]:

"(a) In regulating the railroad industry, it is the general policy of the United States Government --

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system; ~~by allowing rail carriers to earn adequate revenues, as determined by the Board;~~

(4) to ensure the development and continuation of a sound rail transportation system with

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<sup>0</sup> 49 U.S.C. § 10101.

effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

~~(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;~~

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, ~~to avoid undue concentrations of market power,~~ and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the disposition within one year of commencement of all proceedings required or permitted to be brought under this part, except by the consent of the parties or an order of the Board extending the one year period for good cause.

(b) Primary Objectives. The primary objectives of the rail transportation policy of the United States shall be --

(1) to ensure effective competition among rail carriers at origin and destination;



(2) to avoid undue concentrations of market power;

(3) to maintain reasonable rates in the absence of effective competition; and

(4) to give equal weight (a) to the needs of rail carriers to earn adequate revenues and (b) to  
the rights and remedies provided to rail shippers by statute."

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- **Maximum Rate Issues**
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Since 1976, the nation's railroads have been accorded the freedom to price rail transportation with minimal oversight. In general, a railroad's rate is not subject to challenge unless it is first found that the railroad has market dominance<sup>0</sup> as defined by 49 U.S.C. § 10707(a). Likewise, a rate is not subject to challenge if the rate charged "results in a revenue-variable cost percentage for such transportation that is less than 180 percent." While the grain, feed and processing industry generally supports the rate freedom set forth in the statute, the regulatory process used by the former Interstate Commerce Commission and inherited by the STB generally has been viewed as too costly, too complex and too unpredictable for agricultural rail users of all sizes.

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- **Elimination of Product and Geographic Competition**
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The NGFA supported the STB's rulemaking<sup>0</sup> to eliminate the so-called product and geographic competition tests from the statutory market dominance determination required in maximum rate cases. The NGFA commends the STB for recognizing the substantial and often overwhelming burdens these criteria imposed on rail users seeking the limited rate relief accorded under the Act. The discovery and expert witness costs resulting from the ICC-imposed product and geographic tests served as an unnecessary obstacle to the processing of rate reasonableness complaints.

We believe that elimination of the product and geographic competition tests are a step in the right direction. Unfortunately, the nation's railroads have continued to challenge the STB's efforts to simplify the rules and recently filed a petition for reconsideration of the STB's decision<sup>0</sup>. The NGFA supports continued efforts to simplify the process for resolving maximum rate disputes. We urge Congress to also support the STB's efforts.

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<sup>0</sup> That section provides that "'market dominance' means an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies."

<sup>0</sup> *Market Dominance Determinations - Product and Geographic Competition*, STB Ex Parte No. 627 (Dec. 21, 1998).

<sup>0</sup> The NGFA on February 1, 1999 filed reply comments with the STB opposing the "Petition of Association of American Railroads for Reconsideration" and "Petition of Union Pacific Railroad Company for Clarification or Reconsideration."

## Reforming Outdated Maritime Laws

At a time when the need of U.S. agriculture for competitive transportation alternatives is on the rise, the perverse effects of outdated maritime laws – commonly known as the Jones Act – are particularly troubling.

This law prohibits the use of available, self-propelled foreign-flag vessels to move grain and grain products between U.S. ports, even when U.S.-flag vessels are unavailable. For U.S. agriculture, one of the effects of this law has been to prevent the vessel transport of grains and grain products from the Great Lakes to hog and poultry feeders in the Southeast. Instead, these feeders have begun to import feed grains, feed wheat and protein from Canada, Europe and South America, to supplement grains originated by rail from the Eastern corn belt. Poultry feeders in California also have reported importing Canadian wheat by vessel – unable to source such U.S. grain competitively by vessel from Pacific Northwest ports. And the only flour mill in Hawaii buys Canadian wheat because of the unavailability of U.S.-flag vessels at competitive market rates.

As is the case with so many protectionist laws, the Jones Act has failed to stem the decline of the sector it was intended to benefit – the U.S. maritime industry. Only one bulk U.S.-flag self-propelled vessel has been built in the 1990s. And maritime employment has declined from 56,000 jobs in 1950 to less than 10,000 today – most of whom work on the inland waterways. There is not a single U.S.-flag coastal freighter plying the nearly 2,000 miles of coastline between Maine and Florida.

The NGFA strongly supported<sup>1</sup> legislation (S. 1138, the *Freedom to Ship Act*<sup>0</sup>) in the 105<sup>th</sup> Congress, which would have permitted foreign-flag vessels to carry cargoes between U.S. ports on a spot-market basis. Among other things, this carefully measured

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<sup>1</sup> The NGFA also supports the efforts of the Jones Act Reform Coalition, which is comprised of a diverse group of agricultural and non-agricultural groups and firms. A current list of the coalition's supporters is available on the Internet at: <http://www.jonesactreform.org>.

<sup>0</sup> Sponsored by Senators Helms, Brownback, Hagel, Burns and Roberts.

approach would have limited foreign-flag vessels to four coastal voyages in a 60-day period or six trips per year, whichever was less.

Such a change, for example, would permit a Japanese-flag vessel bound for a Great Lakes port to carry bulk fertilizer from a Florida port. It also would allow a foreign-flag vessel to carry grain from a Great Lakes port to a U.S. port outside of the Great Lakes, such as Wilmington, N.C. And it would encourage the development of competitive waterborne transportation between ports in Hawaii, Alaska, U.S. territories and the U.S. mainland.

Measured reform<sup>0</sup> to correct the destructive aspects of the Jones Act would make an important contribution to improving U.S. agriculture's competitive transportation alternatives.

## Conclusion

NGFA will continue to work with the nation's rail carriers to explore additional private sector methods of addressing the concerns of agricultural rail users. Meanwhile, the NGFA supports continued and ongoing Congressional oversight of the Surface Transportation Board as a means of ensuring that the agency carries out its statutory responsibilities. Additionally, NGFA supports:

**1. adequate funding of the STB from general appropriations. User fees are not an appropriate funding mechanism for a quasi-judicial agency such as the STB;**

**reauthorization of the STB for up to two additional years;**

**2. amendment of the ICC Termination Act of 1995 to require that the chairman of the STB be designated with the "advice and consent of the Senate;"**

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<sup>0</sup> For example, the limited reform offered by Senators Brownback, Helms, Burns and Lugar during the 105<sup>th</sup> Congress in S. 2390, the *Freedom to Transport Act*, would have eliminated a substantial barrier to new entrants in the deepwater coastwise trade. Under that bill, a foreign-built vessel would have been eligible for a "coastwise endorsement" for the transportation of bulk agricultural products and livestock. Other requirements of the Jones Act would have been retained.

2. amendment of the rail transportation policy set forth at 49 U.S.C. § 10101; and
2. reform of the nation's outdated maritime cabotage laws as a means of encouraging additional intermodal competition.

## ATTACHMENTS TO NGFA TESTIMONY

- A. ***Agreement on Predispute Consent to NGFA® Arbitration;***
- A. ***NGFA® Rail Arbitration Rules*** (including proposed amendment);
- A. ***Predispute Agreement to Mediate Certain Rate Issues.***

Attachment "A" to Senate Testimony
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**Agreement  
on  
Predispute Consent  
to  
NGFA® Arbitration**

1. This agreement is entered into between the undersigned railroads, the Association of American Railroads (AAR) and the National Grain and Feed Association (NGFA®).
2. The undersigned railroads hereby consent to arbitration before the National Grain and Feed Association as to any dispute with a rail user relating to rail transportation for issues set forth in proposed Section 2(b) of the NGFA Rail Arbitration Rules on a commodity set forth in proposed Section 2(c) of the proposed NGFA Arbitration Rules, a copy of which is attached and incorporated herein. Additional NGFA-member railroads may become signatories to this agreement by executing their consent thereto during the term of this agreement (including any renewal period).
2. The NGFA shall send out an election form to its Active and Associate/Trading classes of membership which shall offer to such rail users the opportunity to make an election by October 1, 1998 as to whether or not to become a party to this "Agreement on Predispute Consent to NGFA Arbitration" with the railroad signatories. Failure to return the election form shall be deemed to exclude such rail user from the applicability of this agreement during the term of this agreement. Firms becoming NGFA Active or Associate/Trading members subsequent to the effective date of this agreement shall have sixty (60) days after their election to membership by the NGFA Board of Directors to make a similar election to become a party to this agreement.
1. This agreement shall become effective for disputes arising from rail transportation occurring on or after October 1, 1998. This agreement shall continue in effect until October 1, 2000 (Termination), except that any party to the agreement may withdraw from the agreement prior to Termination by giving ninety (90) days notice of such withdrawal (Early Withdrawal) to the NGFA. The Early Withdrawal shall become effective ninety (90) days after receipt by the NGFA. A party exercising its right to Early Withdrawal shall be obligated to arbitrate any covered disputes arising before the effective date of such Early Withdrawal.
5. This agreement and the proposed Rail Arbitration Rules shall be submitted to, and are subject to approval by, the NGFA Board of Directors.
5. This agreement shall obligate the railroad and rail user parties to arbitrate only those disputes set forth in proposed Section 2(b), (c), (d) and (e) of the proposed NGFA Rail Arbitration Rules. This agreement shall not preclude a party from asserting in a non-arbitration forum any defense, counterclaim, crossclaim or setoff involving an arbitrable matter.
5. The parties agree that it is their goal to reach agreement on the rules applicable to the arbitration of

so-called sidetrack agreements commonly entered into between railroads and rail users. The parties agree that the NGFA Rail Arbitration Rules Committee referenced in the proposed Rail Arbitration Rules shall be delegated the task of developing and proposing arbitration procedures for resolving disputes regarding sidetrack agreements. The committee shall provide its recommendations to the NGFA and the AAR in writing for approval before January 15, 1999.

5. This agreement and the consent to arbitration given by the railroad and rail user parties to this agreement shall be considered an enforceable agreement to arbitrate under the provisions of the Federal Arbitration Act at 9 U.S.C. § 2, as now existing or hereinafter amended.

5. This agreement is not intended to replace the private negotiation and resolution of disputes by parties. In all cases, rail users and railroads are encouraged to make reasonable efforts to resolve matters before pursuing formal dispute resolution procedures.

Dated this 25<sup>th</sup> day of August, 1998.

National Grain and Feed Association

Association of American Railroads

**Railroad Signatories** (as of March 1, 1999):

- Burlington Northern Santa Fe Railway Co.
- Canadian National
- Canadian Pacific Railway
- Consolidated Rail Corp.
- CSX Transportation Co.
- Dakota, Minnesota and Eastern Railroad
- Illinois Central Railroad
- I & M Rail Link, LLC
- Iowa Interstate Railroad, LTD
- Kansas City Southern Railway
- Kyle Railroad
- Norfolk Southern Railway Company
- Ohio Central Railroad System
- Red River Valley & Western Railroad Co.
- Union Pacific Railroad Company



## Attachment “B” to Senate Testimony

### **Rail Arbitration Rules© of the National Grain and Feed Association**

The NGFA® Rail Arbitration Rules were adopted by the NGFA Board of Directors on August 24, 1998 and became effective on October 1, 1998.

The Board-adopted amendments created a new NGFA Rail Arbitration Rules Committee, which was charged with addressing rail sidetrack issues not covered by the original rules. The NGFA Rail Arbitration Rules Committee has proposed that Section 2 of the **NGFA Rail Arbitration Rules** be amended by adding a new subsection designated as 2(b)(9). This amendment will permit NGFA-member rail users and railroads to resolve sidetrack-related property damage claims through NGFA arbitration. This approach should encourage both parties to be reasonable when negotiating sidetrack agreements and in resolving disputes arising from such agreements. In the event of arbitration, the arbitrators will still give effect to balanced agreements, but will have the power to decide a case differently when particular provisions of an agreement are deemed to be commercially unreasonable based upon the facts presented to them. The \$200,000 per occurrence limit on claims set forth in Section 2(e) would also apply to this new section. The proposed amendment to the rules is underlined and will be voted on by NGFA-member railroads and rail users at the NGFA’s annual convention on March 23, 1999. If approved, the amendment will become effective on April 22, 1999 [30 days after adoption at the annual meeting].

#### **Description and Purpose**

##### **Section 1.**

These Rail Arbitration Rules amend and supplement the Arbitration Rules of the National Grain and Feed Association, which along with these supplementary rules, shall constitute the rules applicable to arbitration of disputes involving the transportation of grain, feedstuffs and/or grain products by a railroad in North America when one or more of the parties to the dispute is a railroad.

#### **Matters to be Arbitrated**

##### **Section 2.**

(a) A railroad and a rail user may agree to submit any dispute to arbitration before the National Grain and Feed Association where at least one party to the dispute is a NGFA member.



(b) A party to the “Agreement on Predispute Consent to NGFA Arbitration” shall arbitrate the following disputes arising between railroads and rail users involving rail transportation in the United States upon the filing of a complaint with the National Secretary:

- (1) disputes involving the application of a railroad’s demurrage rule(s) or term(s);
  - (2) disputes involving the misrouting of loaded rail cars or locomotives;
  - (3) disputes arising under receipts and bills of lading governed by 49 U.S.C. § 11706 (*e.g.*, Carmack disputes such as loss and damage claims, etc.);
  - (4) except as otherwise mutually agreed, disputes arising from a contract between the parties for transportation between one or more rail carriers with one or more purchasers of rail services that has become effective under 49 U.S.C. § 10709;
  - (5) disputes involving the application of a railroad’s special car or equipment program rules (*e.g.*, certificates of transportation, vouchers, pool contracts, etc.);
  - (1) disputes involving the application of a railroad’s general car distribution rules;
  - (7) disputes involving the mishandling of private cars or locomotives;
  - (8) disputes involving a lease by a rail user of real property owned by a railroad or railroad affiliate, subject to the limitations set forth in Section 4.
  - (9) disputes involving property damage claims arising under or related to a rail sidetrack agreement, whether the sidetrack is owned and/or operated by a rail user member of the NGFA, a railroad or third party. The arbitrators shall decide such a case based upon the express terms of such sidetrack agreement between the parties unless the arbitrators find that the relevant liability provision(s) in such agreement is/are commercially unreasonable. In that event, the arbitrators may decide the case based upon what they find to be commercially reasonable under the facts of the particular case.
- (c) The disputes for which a party to the “Agreement on Predispute Consent to NGFA Arbitration” is obligated to arbitrate under subsection (b) above shall be limited to those involving grain, feedstuffs and/or grain products, which shall be deemed to include commodities designated by the following Standard Transportation Commodity Code (STCC) definitions:

<b><u>STCC</u></b>	<b><u>Description</u></b>
01-131	Barley
01-132	Corn
01-133	Oats
01-135	Rye
01-136	Sorghum Grains
01-137	Wheat
01-139	Grain, NEC
01-141	Cottonseeds
01-142	Flaxseeds
01-144	Soybeans
01-149	Oil Kernals, nuts or seeds
01-152	Popcorn

01-159	Seeds
01-191	Fodder Hay or Roughage
01-341	Beans, Dry Ripe
01-342	Peas, Dry
01-343	Cowpeas, Lentils or Lupines
01-992	Alfalfa Meal
20-411	Wheat Flour
20-412	Wheat bran, middlings
20-413	Corn meal or flour
20-414	Rye flour
20-415	Oat flour
20-418	Grain mill by-products
20-419	Flour or other grain mill products, NEC
20-421	Prepared Feeds
20-461	Corn syrup
20-462	Corn starch
20-463	Corn sugar
20-464	Dextrine, corn, tapioca or other
20-465	Corn oil
20-466	Other starch
20-467	Wet process corn or similar mill by-products
20-469	Wet process corn milling or by-products
20-471	Bird Food or Seed, Domestic
20-619	Beet Pulp Pellets
20-823	Spent Grains
20-831	Malt
20-839	Malt Products
20-859	Distillers By-Products
20-914	Cottonseed Meal or By-Products
20-921	Soybean oil
20-923	Soybean meal and hulls
20-933	Nut or Vegetable Oils
20-939	Oil Seed Meals & By-Products, NEC
20-942	Fish Meal
20-144	Animal Protein Products
01-134	Rough Rice
20-449	Milled Rice, Rice By-Products, etc.
20-442	Rice Flour
20-933	Rice Oil
20-442	Rice Bran
37-422	Freight cars moving on own-wheels

The 5-digit STCC categories listed above shall be deemed to include all commodities with codes derived from the 5-digit categories. For example, the STCC 20-939 shall be deemed to include STCC 20-939-39 (Rapeseed or Canola Meal).

(d) A party against whom a complaint has been filed may file a counterclaim or offset, and assert any defense it may have against the plaintiff arising out of the same transaction upon which the complaint is based so long as such claim or defense is one of the issues included in subsection (b). The National Secretary may, upon application of one of the parties, stay an arbitration pending the resolution of non-arbitrable issues if the National Secretary is satisfied that such a

stay will not unfairly prejudice the other party and provided that the applicant is not in default in the arbitration proceedings.

(e) A party shall not be obligated to arbitrate claims seeking more than \$200,000 per occurrence. A party shall not be obligated to arbitrate personal injury claims.

### **Substantive Law Unaffected**

#### **Section 3.**

These rules do not change substantive law and thus shall not be construed as either creating or limiting the general or specific substantive law applicable to disputes arising between parties to an arbitration case. All decisions rendered pursuant to these rules shall be binding upon the parties as provided for in the NGFA Arbitration Rules, subject to vacation only on such grounds as are set forth in the Federal Arbitration Act at 9 U.S.C. § 10, as now existing or hereinafter amended.

### **Real Estate Leases**

#### **Section 4.**

Real estate leases subject to arbitration under Section 2(b)(8) of these rules and the standards and limitations applicable to arbitration of such disputes, are as follows:

(a) A dispute involving the application of a lease of real property owned by a railroad or railroad affiliate ("Rail Lessor"), on the one hand, and leased by a rail user member of the NGFA which operates a grain elevator, feed mill, processing plant or other agricultural facility, receiving or entitled to receive rail service as provided herein, on the leased premises ("Facility Lessee"), on the other, except for specific disputes arising under Chapter 109, 111 or 113 of Subtitle IV, Part A, Title 49 U.S.C. The arbitrators shall have no authority to modify or refuse to apply the existing terms of a lease in resolving such disputes. Railroad affiliate means any person which succeeds to the real property interest of a Rail Lessor after this provision takes effect if that person continues to provide rail service to a Facility Lessee which is subject to Subtitle IV, Title 49 U.S.C.

(b) A dispute involving termination, expiration or renewal of a lease of real property owned by a Rail Lessor and leased by a Facility Lessee, except for specific disputes arising under Chapter 109, 111, or 113 of Subtitle IV, Part A, Title 49 U.S.C., subject to the following:

(1) The arbitrators shall have no authority to resolve a dispute concerning such termination, expiration, or renewal where:

(A) The lease covers real property which the Facility Lessee has not used to receive or forward rail shipments for a continuous period of twelve (12) months or more, unless such disuse has been caused by any act of force majeure or unwillingness or inability of the serving railroad to provide rail service when reasonably requested to do so,

(A) Notwithstanding the provisions of Section 4(b)(1)(D), the Facility Lessee is in material default under the terms of the lease, and such default either has not been cured after reasonable notice, or as required by the lease (This, however, does not preclude the arbitration of the question of whether the Facility Lessee is in material default),

(A) The Rail Lessor's title to the leased premises is reversionary and the reversion has occurred,

(A) The dispute involves a matter other than rental or liability terms,

(A) The Rail Lessor provides an affidavit verifying that it intends to use the premises for rail or rail-related operations that justify non-renewal or termination of the lease, or

The Rail Lessor sells the premises on terms that are the same or more favorable to the Rail Lessor than sale terms presented in writing by the Rail Lessor to the Facility Lessee and not accepted in writing by the Facility Lessee within thirty (30) days.

(2) In the event a Rail Lessor and a Facility Lessee are unable to agree on the rental rate for renewal of a lease of real property, the arbitrators may establish the rental rate. However, the arbitrators may not require the Rail Lessor to accept a rental rate which is less than the fair market rental value of the leased premises based on the highest and best use, but not including the separate value of tenant improvements attributable to the current tenant.

(3) In the event the parties fail to agree to the liability terms proposed for renewal of a lease of real property, either party may submit the liability terms proposed for review to NGFA arbitration. The arbitrators may reject and revise the terms proposed to the extent that they are commercially unreasonable (giving consideration, but not limited, to the nature of the Facility Lessee's operations, the rental rate relative to potential liabilities assumed by each of the parties, and customary commercial real estate practices), or unconscionable. The arbitrators shall not require a party to bear any liability for environmental contamination caused by the other party.

(4) The arbitrators may not require renewal or extension of a lease of real property for a term exceeding five (5) years. If, at the expiration of such lease, the Rail Lessor and Facility Lessee are unable to agree on the rental or liability terms for renewal or continuation of the lease, either party may seek prescription of such terms under this subsection (b).

(4) The arbitrators in making a decision on the renewal or extension of a lease of real property shall consider whether the Rail Lessor has demonstrated other uses for the property which justify a refusal by a Rail Lessor to renew or extend a lease.

## **Amendments**

### **Section 5.**

The chairman of the National Grain and Feed Association shall appoint a Rail Arbitration Rules Committee comprised of ten (10) persons who are officers, partners or employees of NGFA-member railroads and rail users. At least five (5) members of the committee shall be representatives of railroads. It shall be the duty of the committee to consider amendments to the Rail Arbitration Rules and report its recommendations to the membership at any annual meeting or to the Board. Changes to these rules shall be approved by the Rail Arbitration Rules Committee before being considered for approval by the NGFA Board of Directors or the general membership. All railroad members of the association shall be entitled to vote on changes to the Rail Arbitration Rules at any annual meeting considering the adoption, ratification or amendment of such rules.

## **Arbitration Service Fees**

### **Section 6.**

The arbitration service fees paid by a disputant under these Rail Arbitration Rules shall be the same as those set forth in the NGFA Arbitration Rules, except that the fees paid by nonmembers under these rules shall be 150% of the fees paid by NGFA members.

Attachment “C” to Senate Testimony
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PREDISPUTE AGREEMENT

## TO MEDIATE CERTAIN RATE ISSUES

1. This agreement is entered into between the undersigned railroads, the Association of American Railroads (AAR) and the National Grain and Feed Association (NGFA®).
2. The undersigned railroads hereby consent to confidential mediation with NGFA Active or NGFA Associate/Trading members who are rail users when a dispute arises regarding the following issues involving the rail transportation of agricultural commodities designated by the Standard Transportation Commodity Code (STCC) definitions referenced in Section 2(c) of the Rail Arbitration Rules of the National Grain and Feed Association:
  - a.) a dispute involving an allegation of unreasonable discrimination by a rail carrier as to rates charged a rail shipper or receiver for rail transportation;
  - a.) a dispute involving an allegation that the switching rates, rules or practices of carriers unreasonably bar access of a rail shipper or receiver to markets.
3. The following shall apply to all mediations conducted pursuant to this agreement:
  - a.) The mediation and any statements made in the mediation process shall be treated as confidential;
  - a.) All statements made in such a mediation are privileged against use in any other proceeding relating to the dispute, even in cross-examination;
  - a.) Notes taken by any person at the mediation must be destroyed at the conclusion of the mediation, except for the notes of any final agreement reached by the parties;
  - a.) Any person(s) serving as a mediator will not be called as a witness or be otherwise involved in any ongoing arbitration or litigation, should the mediation not result in a settlement.
- 4. Procedure for Initiating Mediation:** A NGFA Active or Associate/Trading member may initiate a request for mediation on one or more of the issues set forth above by filing a request with the National Secretary of the NGFA. Mediation shall mean an informal, nonbinding conference or conferences between the parties in which a mediator will seek to guide the parties to a resolution of the dispute.
  - 1. Selection of Mediators:** The parties to a mediation may select any mutually agreeable panel member from the list of mediators maintained by the NGFA. If the parties cannot agree or have no particular choice of a mediator, then the names and resumes of three (3) available mediators shall be sent to each of the parties, each of whom may strike up to two (2) names from the list. If more than one (1) name remains after each party acts, then the National Secretary of the NGFA shall select the mediator from the remaining names.
  - 1. Duration of Mediation:** The mediation process shall continue until the case is resolved or the mediator makes a finding that there is no possibility of settlement through mediation or either party chooses not to continue further.
  - 1. Costs of Mediation:** The party requesting mediation shall pay a fee of \$500 to the National Grain and Feed Association, which shall accompany the request to mediate. Thereafter, each party shall pay their own expenses plus one-half (1/2) of the expenses of the mediation including the mediator's fees. The

mediator selected for the mediation shall disclose the basis for calculating his/her fees and expenses upon request by the National Secretary or any party to a mediation.

**1. Limitations of Actions:** Except as otherwise agreed by the parties, the commencement of a mediation under these rules shall not be deemed to toll the statute of limitations as to the claims being mediated.

**1. Term of Agreement:** This agreement shall become effective for mediation requests filed on or after October 1, 1998. This agreement shall continue in effect until October 1, 2000 (Termination), except that a railroad signatory may withdraw from the agreement prior to Termination by giving ninety (90) days notice of such withdrawal (Early Withdrawal) to the NGFA. The Early Withdrawal shall become effective ninety (90) days after receipt by the NGFA.

1. This agreement shall be submitted to, and is subject to approval by, the NGFA Board of Directors.

Dated this 25th day of August, 1998.

National Grain and Feed Association

Association of American Railroads

**Railroad Signatories** (as of March 1, 1999):

- Burlington Northern Santa Fe Railway Co.
- Canadian National
- Canadian Pacific Railway
- Consolidated Rail Corp.
- CSX Transportation Co.
- Dakota, Minnesota and Eastern Railroad
- Illinois Central Railroad
- I & M Rail Link, LLC
- Kansas City Southern Railway
- Kyle Railroad
- Norfolk Southern Railway Company
- Ohio Central Railroad System
- Red River Valley & Western Railroad Co.
- Union Pacific Railroad Company